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RECEIVED and FILED by the
NEW JERSEY STATE BOARD OF
VETERINARY MEDICAL EXAMINERS
on this date of: 5-30-2007

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STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS -
BOARD OF VETERINARY MEDICAL EXAMINERS

IN THE MATTER OF

MARK DANIEL ESSER, V.M.D.

TO PRACTICE VETERINARY MEDICINE
IN THE STATE OF NEW JERSEY

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Administrative Action

CONSENT ORDER

This matter was opened to the State Board of Veterinary Medical Examiners (hereinafter referred to as the "Board") following the Board's review of two consumer complaints filed by Annie DePaola following her visits with her pets to Mark Daniel Esser, V.M.D. In her first complaint to the Board, Ms. DePaola alleged that the respondent, Dr. Esser, engaged in professional misconduct and was negligent in his treatment of her five (5) year old Chihuahua, "Poncho," from September 2004 until December 2004.

Similarly in her second complaint, Ms. DePaola alleged that Dr. Esser engaged in professional misconduct in his care of her four (4) year old Chihuahua, "Peanut," in January 2005. Finally, in both complaints Ms. DePaola alleged that the respondent failed to release her dogs' patient records despite her requests.

In the first complaint, Poncho was presented by Ms. DePaola to the Rothman Animal Hospital ("Hospital") on September 10, 2004 with complaints of a sore hind leg. Dr. Esser is the Medical Director of the Hospital. On this visit, the dog was examined by Keith Javic, V.M.D. Following his examination of Poncho, Dr. Javic placed the dog on certain medications, including Rimadyl, and recommended restricted activity. When there was no improvement in Poncho's condition, Dr. Javic changed the medication to Prednisone.

Again Poncho did not improve and alternative measures, including femoral head ostectomy ("FHO") surgery, were discussed. The owner was provided an estimate of the surgical procedure, which also included an estimate of a dentistry procedure to be performed simultaneously with the FHO, of \$400.00-\$600.00 plus incidentals, including IV fluids and pain medicine. Ms. DePaola ultimately elected the FHO surgery and requested that Dr. Esser perform the procedure. The surgery was performed by the respondent on December 21, 2004. On the day of the surgery, the owner paid \$580.00 with

her credit card for the FHO and dental procedures. Subsequent to the surgery, the owner was presented with a bill totaling \$930.88.

Ms. DePaola maintains that Poncho experienced excruciating pain during his recuperation period from the surgery and that Dr. Esser did not provide adequate follow-up care to the dog. The owner further alleges that the respondent was uninterested in her complaints to him, relative to the dog's failure to improve after the surgery, during subsequent telephone conversations. Subsequent to the surgery, Poncho was examined by Marvin Rothman, D.V.M., on January 20, 2005 at the Hospital. Dr. Rothman found the dog's leg to be painful with motion and referred her to a veterinarian specializing in orthopedics.

Poncho was examined by Philippe R. Coudrai, M.S., V.M.D., on or about January 26, 2005. A second surgery was performed on Poncho by Dr. Coudrai on February 17, 2005. During this surgery, the femoral head was "shaved" with rongeurs and rasp and fibrous scar tissue was removed from the acetabulum. The dog recovered well and, as of March 5, 2005, had significantly improved weight bearing on his left hind leg.

In correspondence dated July 28, 2005, Dr. Esser maintained that the owner had been orally advised of the revised surgical estimate of \$600.00-\$900.00. Additionally, the respondent asserted that he did provide adequate follow-up care to Poncho. Finally, Dr. Esser admitted that it is the Hospital policy that

medical records are never released to clients who have an outstanding balance.

The Board, following its review of the patient records, and other relevant documents in this matter, has concluded that Dr. Esser engaged in repeated acts of negligence, in violation of N.J.S.A. 45:1-21(d), in that he performed an inadequate removal of the femoral head during the December 21, 2004 surgery and that he failed to perform proper follow-up and determine that a second surgery was necessary. These facts establish a basis for disciplinary action.

Additionally, the Board found that Dr. Esser engaged in professional misconduct, contrary to N.J.S.A. 45:1-21(e), in that he failed to provide the owner with an accurate estimate of the cost of the medical procedures to be provided. Moreover, the Board concluded that the respondent violated its patient record regulation by failing to document in the record all pertinent symptoms and signs observed and/or any medical conclusions to substantiate the need for the FHO surgery, as required by N.J.A.C. 13:44-4.9(a)(5) and (7). Finally, the Board found that Dr. Esser violated the record keeping rule when he refused to provide patient records to the owner in violation of N.J.A.C. 13:44-4.9(c). These facts establish a violation of N.J.S.A. 45:1-21(e), (h) and N.J.A.C. 13:44-4.9 and therefore provide a basis for disciplinary action.

In the second complaint, Ms. DePaola presented "Peanut," then newly adopted, to the Hospital on January 20, 2005 for an initial check-up. The dog was seen again in January 25, 2005 and the owner paid the costs of these visits in full. In or about July 2005, Ms. DePaola requested that the Hospital forward a copy of Peanuts' medical records to a subsequent veterinary practice for the performance of a spay on the dog. The Hospital refused to release the patient records as a result of an outstanding and disputed balance due on another pet, Poncho. In a correspondence to the Board dated October 4, 2005, Dr. Esser reiterated the Hospital's policy of refusing to release records to clients that have an outstanding balance.

Having reviewed the entire record in this matter, the Board concluded that Dr. Esser again violated or failed to comply with its patient records regulation, N.J.A.C. 13:44-4.9, in that he failed to release Peanuts' records pursuant to the requirements of the regulation. This conduct constitutes a violation N.J.S.A. 45:1-21(h) and therefore establishes a basis for disciplinary action.

It appearing that the respondent desires to resolve this matter without admissions, and any and all liability and wrongdoing being expressly denied, and without recourse for further proceedings; and the Board having been satisfied that the within

resolution adequately protects the public health, safety and welfare, and for good cause shown:

IT IS, THEREFORE, ON THIS 23rd DAY OF MAY 2007,

ORDERED THAT:

1. The respondent, Mark Daniel Esser, V.M.D., is hereby reprimanded for his conduct as described above, in violation of N.J.S.A. 45:1-21(d), (e), (h) and N.J.A.C. 13:44-4.9.

2. Respondent shall cease and desist from further violations of N.J.S.A. 45:1-21(d), (e), (h) and N.J.A.C. 13:44-4.9.

3. Dr. Esser shall pay a civil penalty in the aggregate amount of \$5,000.00 for the following violations: 1) \$1,000.00 for engaging in repeated acts of negligence, contrary to N.J.S.A. 45:1-21(d); 2) \$1,000.00 for engaging in professional misconduct for failure to provide an accurate estimate, in violation of N.J.S.A. 45:1-21(e); 3) \$1,000.00 for failure to adequately document in the patient records the medical findings and/or rationale to substantiate the FHO surgery, contrary to N.J.A.C. 13:44-4.9(a); 4) \$2,000.00 for failure to release medical records, in violation of N.J.A.C. 13:44-9(c) for both Poncho and Peanuts. Such penalty shall be paid by certified check or money order made payable to the State of New Jersey and submitted to the State Board of Veterinary Medical Examiners at 124 Halsey Street, Post Office Box 45020, Newark, New Jersey 07101, within fifteen (15) days following entry

of this Order. Subsequent violations will subject respondent to enhanced penalties pursuant to N.J.S.A. 45:1-25.

4. In the alternative, payment for the civil penalties shall be made by Dr. Esser in installment payments for the period of twenty-two (22) months at the rate of \$217.00 per month commencing on April 15, 2007. The twenty-third (23rd) and final payment shall total \$226.00. These payments shall be made by certified check or money order made payable to the State of New Jersey. Additionally, the payments shall be due on or before the fifteenth (15) day of each month and shall be submitted to Leslie G. Aronson, Executive Director of the Board of Veterinary Medical Examiners at the address listed above. Any failure to make any installment payment when due shall cause the entire remaining balance to become immediately due and payable without further notice. Subsequent violations will subject respondent to enhanced penalties pursuant to N.J.S.A. 45:1-25.

5. Failure to comply with any of the provisions of this Order or remit any and all payments required by this Order will result in the filing of a certificate of debt and may result in subsequent disciplinary proceedings for failure to comply with an Order of the Board.

NEW JERSEY STATE BOARD OF
VETERINARY MEDICAL EXAMINERS

By: Mark W. Logan VMD
MARK W. LOGAN, V.M.D.
President

I have read and understand the
within Consent Order and agree
to be bound by its terms. Consent
is hereby given to the Board to
enter this Order.

Mark Daniel Esser
MARK DANIEL ESSER, V.M.D.

DATED: 5/8/07

Consent as to form and entry.

William A. Garrigle
WILLIAM A. GARRIGLE, ESQUIRE
Garrigle and Palm

DATED: 5-8-07